Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, *et al.*,
Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of Utah

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BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANTS

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3APP

QUESTION PRESENTED

Whether the First Amendment prohibits Congress from allowing religious organizations to hire only members of their own faith to conduct all of their activities, including those deemed "nonreligious" under secular criteria.

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BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The Christian Legal Society is a non-profit professional association of 4,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual

citizen's respect for, and allegiance to, our constitutional government.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,700 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, is concerned about the impact of religious principles on employment matters.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 44,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Appellants.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first major case since *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), in which this Court will have the opportunity to address on the merits the rights of religious institutions [1] to control their own internal

[1] Throughout this brief, we will use the term "church" as a shorthand expression for "religious organization." The term is not confined to institutions of the Christian Church, but includes synagogues, temples, mosques, and religious organizations of all faiths. Moreover, the term is not confined to institutions or houses of worship—to "churches" narrowly understood—but includes all organizations, institutions, or societies with a religious purpose. See

organization. At issue is the constitutionality of Section 702 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-1, which allows religious organizations to prefer members of their faith for employment in the organization's activities. Whether viewed as free exercise or nonestablishment—as associational freedom or separation of church and state—the principles of this case go to the core of what religious liberty means under the First Amendment.

Congress has wisely recognized that religious affiliation has a legitimate place in the hiring decisions of religious organizations, and that an attempt to confine church hiring discretion to "religious" activities creates more constitutional difficulties than it solves. To the extent that the statutory exception is wider than the minimum required under the First Amendment, it has the purpose and effect of guaranteeing "free exercise breathing space" and eliminating the need for case-by-case inquisition into the nature and sincerity of the "religious" element in church activities.

Under the district court's ruling, however, government officials charged with enforcing Title VII are required to sift through the activities of churches in order to determine (on the basis of intrusive criteria utterly foreign to the church's own perspective) which activities are "religious" and which are not. Then, according to the district court, the government must require the church to entrust portions of its activities—those deemed insufficiently "religious"—to outsiders. This intrusion into the right of religious organizations to define for themselves the scope of their religious mission, and to maintain control over their activities through religious (and not merely economic) discipline, is directly contrary to statute and in no way compelled by the First Amendment. Indeed, the values of the First Amendment are

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R. Toms, *What Is A Church? The Dilemma of the Parachurch* (1979).

far more threatened by the district court's approach than by the statute enacted by Congress.

Section A of this brief discusses the nature of the right to religious autonomy recognized by Congress in Section 702. It demonstrates that under the correct constitutional standard, the district court should have concluded that the LDS Church has the constitutional right to limit employment in the activities in this case to members in good standing of the Church. Under the facts of this case, therefore, there is absolutely no conflict between the statutory exemption and the requirements of the First Amendment.

Section B explains why the district court's reasons for invalidating Section 702 of the Civil Rights Act of 1964, under the Establishment Clause, are mistaken. It shows that the supposed "advancement" of religion feared by the court is merely the consequence of the institutional separation between church and state. Sometimes this separation is to the advantage of religion; more often it is to the disadvantage of religion; but it is not an unconstitutional effect. Congress's decision to exempt religious organizations from the religious antidiscrimination regulations of Title VII eliminates the need for case-by-case inquiries into the religious significance of church activities. While such inquiry may be unavoidable in free exercise cases, where the government has asserted an interest in enforcing a rule despite its effect on religious practice, it is not necessary where the government itself has consented to a broader exemption.

This case is one in which the two principal, and often competing, values of the Religion Clauses—free exercise and institutional separation—coincide. By declining to interfere with the religious requirements of employment within religious communities, Congress has eliminated a source of entanglement and friction between church and state, and has at the same time affirmed the inalienable right of associations of believers to define and carry out their religious missions as they see them.

ARGUMENT

THE STATUTORY EXEMPTION ALLOWING RELIGIOUS ORGANIZATIONS TO PREFER MEMBERS OF THEIR OWN FAITH IN HIRING AGENTS FOR THE CONDUCT OF ALL THEIR ACTIVITIES IS IN FULL HARMONY WITH THE RELIGIOUS FREEDOM PROVISIONS OF THE FIRST AMENDMENT

The right of appellants (the "Church" or the "LDS Church") to hire members in good standing of their own church to conduct church operations is squarely based on statute; but it is more than merely statutory. As the district court held, Section 702 of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-1 (the "702 exemption"), permits "religious entities [to] discriminate against employees on religious grounds with respect to *all* their activites, not just their religious activities" (J.S. App. 20a (emphasis in original)). The congressional decision to exempt religious organizations from Title VII's prohibition on religious discrimination restored churches to the separate and autonomous position they had enjoyed in this country since the end of establishment. The congressional sponsors of the 1972 amendment consciously based their proposal on an understanding of the rights of religious institutional autonomy under the First Amendment. It is the district court's ruling —confining the right to activities deemed, under secular criteria, to be "religious"—that threatens to invade the constitutional rights of appellants and every other religious organization. It is important, therefore, to review the constitutional underpinning of this statutory exemption before turning to the district court's opinion.

A. Churches Have a Constitutional Right to Hire Only Members of Their Own Faith to Conduct Activities Deemed by the Church to be Part of Its Religious Mission

The Religion Clauses of the First Amendment have a strong institutional, as well as individualistic, dimension. Religious liberty means more than being able to comply

with personal religious obligations, like resting on the Sabbath [2] or observing dietary laws.[3] It means being able to form or maintain self-governing religious communities—churches, synagogues, parachurch organizations, religious societies—in which individual believers can bind themselves together in pursuit of religious objectives. It means, moreover, that for purposes of internal organization—doctrine, administration, membership criteria, structure—these religious communities must be free from governmental interference.

Three lines of Supreme Court precedent support this right of institutional religious autonomy. First are the church property cases,[4] culminating in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). These cases recognize that the government (including the courts) may not interfere in issues of "church polity and church administration." *Id.* at 710. See also, *e.g.*, *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 107 (1952) (extending First Amendment protection to matters of "church administration" and "the operation of churches"). Second are the "entanglement" cases, such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). These cases recognize that close government scrutiny of even apparently secular components of a pervasively sectarian institution "is a relationship pregnant with dangers of excessive government direction of . . . churches." *Id.* at 620. The Court's analysis shows particular sensitivity to the entanglement created when the government is called upon "to determine which [activities of a religious institution] are religious and which

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[2] See *e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

[3] See, *e.g.*, *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

[4] The district court (J.S. App. 52a n.49) found reliance on the property cases 'misplaced," on the ground that "this case does not involve internal church conflicts over religious doctrine, practice or discipline." We submit, however, that there is no more justification for state interference with internal church practice at the behest of a non-member than at the behest of a dissident faction.

are secular." *Id.* at 621-22. Third is *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), in which this Court avoided potential First Amendment problems by construing the National Labor Relations Act not to apply to pervasively religious private schools. Among other problems with the Act, the Court foresaw that Labor Board jurisdiction over parochial schools would "involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. Even more fundamentally, the interjection of a secular element—the Union—between the religious hierarchy and the subordinate agents of the church, the teachers, would be inconsistent with the system of "[r]eligious authority [that] necessarily pervades the school system." *Id.* at 501.

In these institutional autonomy cases, two values that often seem to conflict—the values of separation of church and state and of free exercise—are in perfect harmony. Cf. *Thomas v. Review Board*, 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting). Indeed, the constitutional right partakes of both Free Exercise and Establishment Clause elements.[5] The Free Exercise element arises from the right of associations of believers to create self-governing religious communities, through which they can give homage to, and perform the work of, their God on earth. In this sense, church autonomy is a liberty, closely akin to the rights of family and freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-619, 622-23 (1984). "Protecting [the religious community] from unwarranted state interfer-

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[5] See Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1378-88, 1392-94 (1981) (locating church autonomy right under Free Exercise Clause; Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984) (locating church autonomy right under Establishment Clause); *NLRB v. Catholic Bishop, supra* (referring to church autonomy right under "the First Amendment").

ence . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

To focus on church autonomy solely as a matter of personal liberty, however, would neglect the institutional element best seen as arising from the Establishment Clause. The Establishment Clause guarantees a structural relationship of mutual independence between church and state. "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614. Churches, like the press, like political associations, like colleges and universities, provide islands of thought and value independent of the homogenizing pressures of the state; they create diversity and the possibility of growth and choice in society; they generate a spirit of willing compliance with notions of justice and regard for others. In this sense, church autonomy is closely akin to the structural provisions of the Constitution. The Religion Clauses of the First Amendment can be seen as a jurisdictional provision, like the separation of powers, that creates and preserves the preconditions for a free and pluralistic society.

Two specific aspects of institutional religious autonomy are particularly implicated in this case: the right of religious exclusivity (*i.e.*, the right of a religious community to insist that its corporate actions be carried out by and through its own members) and the right of self-definition (*i.e.*, the right of a religious community to determine, by its own criteria, the nature and extent of its religious mission).

The right of religious exclusivity may seem oppressive to outsiders. Appellees in this case, for example, obviously chafe at the fact that in order to perform roles within the LDS Church structure they must conform to the standards and obligations of the Church. But the right to exclude nonmembers is indispensable to the creation of a self-governing community. As this Court has

stated, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. at 623. While churches typically are open to new members, membership must be on the church's own terms. All who unite with the religious body "do so with an implied consent to this government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872). An outsider has no right to share the privileges of membership—including the possibility of employment within the church—while refusing to share the mutual commitments of membership.

The right of religious exclusivity applies no less to a church's agents than to its members. There are many reasons why a religious organization might legitimately prefer to hire only members of its faith, quite apart from any religious duties in the job description. Members of the faith may be more committed to the enterprise. They may serve as moral exemplars. They may communicate the ethos and mores of the church to the outside world. They may have special insight into the spiritual dimensions of the activity. They may help instill the proper spirit or attitude, or enforce the religion's rules or moral standards. They may lead or participate in Bible studies or devotionals in the workplace. They may be objects of the church's charity. They may be the representatives of the church to the world.

Most fundamentally, hiring within the faith reflects the nature of religious authority in the church. As the district court observed (J.S. App. 72a), "Religious authority necessarily pervades all the activities in which a religious organization engages." Religious authority is not reducible to the economic relationship of employer or employee. Cf. *Catholic Bishop*, 440 U.S. at 504 ("The church-teacher relationship in church-operated school differs from the employment relationship in a public or

other nonreligious school.") Churches commonly expect a degree of commitment, in all their operations, that stems from a voluntary submission to a shared understanding of religious norms and objectives. Workers in the church are not wage slaves. The authority of church leadership over the church's operations is not merely a consequence of their power over the paychecks of church employees, but has a spiritual dimension. To force the church to employ outsiders would transform the nature of authority within the religious community from a system of voluntary shared submission to common principles to one of economic command and control.[6]

Contrary to the district court (J.S. App. 54a), the right of religious exclusivity is not limited to instances in which the employment decision is governed by a formal religious "tenet". The right of religious autonomy is a right of independence from government interference, wholly apart from the ability to comply with specific religious doctrine.[7] As this Court explained in *Kedroff*, at stake is "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government *as well as* those of faith and doctrine." 344 U.S. at 116 (em-

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[6] Interference with the right of religious organizations to employ only members of their faith is far more disruptive to religious autonomy than other forms of labor regulation, such as minimum wages, maximum hours, or prohibitions on race or sex discrimination. See *e.g.*, *Tony & Susan Alamo Foundation v. Donovan*, 105 S. Ct. 1953, 1963-64 (1985). These other forms of regulation may also reflect a more compelling governmental interest. See pages 24-27, *infra*. While there are constitutional limitations on these other forms of regulation, this case presents no occasion for defining them.

[7] Indeed, churches must sometimes be constitutionally exempt even from governmental regulations that appear to be in consonance with church doctrine. A church may be conscientiously opposed to racial discrimination, for example, without opening itself to government inquiries about the reasons for hiring, or refusing to hire, its clergy.

phasis added). Every decision made by religious leaders, pursuant to the church's governing structure, is authoritative within the religious community and entitled to respect by the government, absent compelling justification. Many decisions within the church are a matter of prudent judgment rather than interpretation of religious doctrine. A church might, for example, adopt one religious curriculum rather than another, or establish a new program or activity, without anyone believing that the course adopted was compelled by religious dogma. Such decisions are not less protected because not governed by religious doctrine.[8]

The district court (J.S. App. 53a-54a) recognized the Church's constitutional right to restrict hiring to members of its faith, but only for activities the court determined to be "religious." The court examined at length the three church activities at issue in this case to determine, under its own secular criteria, whether they were sufficiently "religious" to warrant constitutional protection. In so doing, the court gravely misconceived the role of the government and the courts in First Amendment controversies, and violated the Church's constitutional right to define and determine for itself the nature of its religious mission.

The concepts of "religious" and "secular" activities are not self-defining. *Cantwell v. Connecticut*, 310 U.S. 296,

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[8] See Laycock, *supra* note 5, at 1390-91 (footnotes omitted):

> Any activity engaged in by a church as a body is an exercise of religion. This is not to say that all such activities are immune from regulation: there may be a sufficiently strong governmental interest to justify the intrusion. But neither are these activities wholly without constitutional protection. It is not dispositive that an activity is not compelled by the official doctrine of a church or the religious conscience of an individual believer. Indeed, many would say that an emphasis on rules and obligations misconceives the essential nature of some religions.

305 (1940);[9] see also *Lemon v. Kurtzman*, 403 U.S. at 621-22; *Thomas v. Review Board*, 450 U.S. at 714. These terms derive their content only from the religious world view of the believers involved in the case. The task of the government in enforcing its regulatory requirements, and derivatively the task of the judiciary in reviewing government action, is not to determine for itself what is "religious" but solely to determine whether the religious entity involved in the case, in good faith, understands the activity in question to be part of its religious mission.

The concept of self-definition is at the core of free exercise jurisprudence. At the time when Fisher Ames first proposed inclusion of the words "free exercise" in the Bill of Rights,[10] twelve of the thirteen states had constitutional provisions guaranteeing freedom of conscience (in many instances using the very language "free exercise" of religion). These provisions made clear that the scope of religious exercise must be determined in accordance with the beliefs of the religious practitioner, and not the outsider's view of what is "religious". The Virginia Declaration of Rights, so influential in the framing of the First Amendment, protected the "free exercise of religion" and defined religion as "the duty which we owe to our Creator, *and the manner of discharging it.*" B. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1909 (1878) (Va. Bill of Rights of 1776, § 16) (emphasis

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[9] In *Cantwell*, a state statute forbade solicitation except for "religious" causes. This Court commented that the official charged with enforcement of the statute "is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment." 310 U.S. at 305. Similarly, in this case the district court held that a religious organization may not exercise its First Amendment rights unless government officials charged with enforcing Title VII determine that the activity is "religious".

[10] See I *Annals of Congress* 766 [796] (Aug. 20, 1789) (J. Gales, ed. 1834).

supplied). Fisher Ames' native Massachusetts defined the right of "worshipping God in the manner and season most agreeable to the dictate of [one's] own conscience." *Id.* at 957 (Mass. Const. of 1780, Pt. I, Art. II). Pennsylvania's much-imitated Declaration of Rights of 1776 protected the citizens' "natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding." *Id.* at 1541 (Art. II).

Given the absence of any discussion of the meaning of "free exercise" in the debates over the First Amendment, it is reasonable to suppose that the framers intended, and the ratifiers understood, the term to carry the meaning that had become familiar in the various state provisions: a definition of free exercise based on the believer's own understanding of religious observances. This is borne out by this Court's free exercise cases, in which the emphasis is placed on whether the believer's assertions of religious conviction are sincere and in good faith —not whether they conform to secular notions of what is "religious." See *United States v. Ballard*, 322 U.S. 78 (1944); *United States v. Seeger*, 380 U.S. 163, 184 (1965). As the Court stated in *Thomas v. Review Board*, 450 U.S. at 714, resolution of what is a "religious" practice "is not to turn upon a judicial perception of the particular belief or practice in question."

As in *Thomas*, one can imagine in this context "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. But it seems to us that the LDS Church's assertions of religious motivation for the conduct of Deseret Gymnasium, Beehive Clothing Mills, and Deseret Industries are sufficiently plausible that, in the absence of proof of bad fatih, the court should have deferred to its claim for constitutional protection.

The district court's approach to determining whether activites of the Church are "religious" disregarded en-

tirely the good faith judgment of the Church, and substituted an examination of secular criteria. The court's approach was contrary to constitutional principles in four respects.

First, the district court confined "religious" activities to those directly related to "spread[ing] or teach[ing] the religious beliefs and doctrine and practices of sacred ritual" of the church (J.S. App. 13a). See also J.S. App. 71a ("[t]he primary purpose of religious organizations, obviously is to carry on religious rituals, teach religious doctrine and proselytize"). This is an exceedingly narrow understanding of the life of a religious community. In addition to doctrinal teaching and the practice of rituals, churches engage in many other activities, including fellowship, social or community service, mutual care and assistance, charity, and outreach. To the outsider, some of these activities may appear to be "secular": is a church supper any different from a secular social event? To the religious community, however, these activities form an integral part of the life together. To teach as "religious" only the doctrinal and ritual aspects of church life is to reduce religious life to a formalism.

Second, the district court used explicitly secular standards to judge the "religious" quality of church activities. Deseret Gymnasium is not "religious", according to the court, because "[i]t offers the same facilities and services that are available in other gymnasiums" (J.S. App. 15a). Although Deseret Gymnasium enforces the LDS Church's doctrinal prohibition on smoking, this is not "religious", according to the court, because the "no smoking rule is as consistent with the beliefs and practices of athletics as it is with the beliefs of the Mormon Church" (*ibid.*). This is pure secular reductionism. A religious activity does not become "nonreligious" merely because some outsiders may perform similar actions for secular reasons. Unbelievers sometimes feed the hungry and care for the sick. This does not make religiously motivated acts of charity any less "religious." Nor do religious standards

of conduct become "nonreligious" merely because they happen to coincide with secular beliefs. See *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments are "religious in nature", notwithstanding their incorporation in the fundamental legal codes of Western nations).[11] If the motivation for maintaining the gymnasium is religious, and if its standards of operation are religious, it is constitutionally irrelevant that secular gymnasiums may appear superficially similar.

Third, the district court refused to grant constitutional protection to sincere religious beliefs unless those beliefs satisfied the court's notion of consistency. In *Thomas v. Review Board*, 450 U.S. at 714, this Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Nonetheless, in connection with Beehive Clothing Mills the district court ordered extensive discovery into the present and past practices of the LDS Church in order to resolve appellee's attack on the "consistence of [appellants'] asserted belief that only eligible members can manufacture temple wear" (J.S. App. 103a). The Court ordered discovery into the reasons for each instance in which the Church had hired individuals who did not observe the standards of the Church (*ibid.*), and into the reasons why the church has not maintained its exclusive hiring standards for the production of temple garments abroad (*id.* at 104a). Neither of these issues is properly within the province of a secular court. Courts are required to accept as authoritative the statements of church authorities about issues of church doctrine. *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449

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[11] Nor is it significant that the Deseret Gymnasium is "open to the public" (J.S. App. 14a). St. Peter's Cathedral in Rome is open to the public, but it is not therefore the constitutional equivalent of the Uffizi. "[A] religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith." *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983).

(1969). That a secular court may review church doctrine as illogical or inconsistent, or be unpersuaded by the church's reasons for applying the doctrine differently in different worldly circumstances, is not a valid basis for rejecting its sincerity or authority.

Fourth, the district court confined "religious" activities to those compelled by religious doctrine. Deseret Gymnasium is not "religious," according to the court, because "there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church" (J.S. App. 15a). Churches engage in many activities that are not compelled by religious doctrine. Nothing in Christian doctrine requires the church to establish a choir, for example, or a youth group softball league. Does this mean that outsiders must be hired to sing soprano, or supervise the youth group?

In a particularly egregious example of securalistic misunderstanding, the district court conceded that Deseret Gymnasium may be "charitable," but held that "there has been no claim or showing that the charitable services are intimately connected to religious beliefs or tenets of the Mormon Church" (J.S. App. 16a n.17). It is not surprising that the connection between faith and good works, which has perplexed many a theological mind, should seem elusive to a secular court. But it is surprising that a court would presume to hold, on the basis of its study of religious doctrine, that the charitable activities of a church are unrelated to its religious function.[12]

Appellants were denied the opportunity to present their full case on the religious nature of Deseret Gymnasium (J.S. App. 18a n.18) and it is therefore necessary for

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[12] The attempt to distinguish between charitable and religious activities was one of the constitutional flaws in the ordinance invalidated in *Rusk v. Espinosa*, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

an appellant court to view the evidence in the light most favorable to their position. The evidence shows that the LDS Church has consistently maintained a distinction between its commercial enterprises, which are conducted through taxpaying corporate entities not covered by the 702 exemption, and church activities, which are conducted directly by the Church itself. See affidavit of Wayne Nelson, ¶ 6; affidavit of J. Richard Clarke. The evidence shows that the Deseret Gymnasium is heavily subsidized by the Church and has no separate corporate or financial existence from the Church. Affidavit of Leon Heaps, ¶¶ 4-5. It is governed by a board that serves at the pleasure of the First Presidency of the Church. *Id.*, paragraph 3. The gymnasium has been held exempt from real estate taxation on the ground that it is used "exclusively for religious and charitable purposes." Affidavit of Leon F. Olsen, ¶ 5. The evidence shows that those who constructed the gymnasium did so in the hope of expectation that "whatever is done by way of exercise, physical contest in games, or whatever it may be in the training and recreation of those who patronize this gymnasium will be done in the spirit of prayer and obedience to [God's] commandments." Prayer of Dedication, Deseret Gymnasium. The evidence shows that the church authorities enforce religious standards of conduct within the gymnasium,[13] and that, as part of the Church's "charitable efforts," they make the gymnasium available at no cost or reduced cost to various religious and community service groups, to LDS missionaries, and to Church leaders. Affidavit of Leon Heaps, ¶ 6.

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[13] The district court acknowledged (J.S. App. 72a) that "[t]he purpose of Deseret is to provide facilities for physical exercise in an atmosphere reflecting the standards of the Mormon Church." This purpose, however, the court inexplicably described as "secular" (*ibid.*). The court also acknowledged that "the religious beliefs of the Mormon Church can be furthered through Deseret" (*ibid.*). It is not clear why the court did not consider this sufficient reason to hold the Church's employment practices in the gymnasium constitutionally protected.

The Deseret Gymnasium seems indistinguishable from countless facilities for wholesome recreation maintained by churches all over the country. The provision of such facilities has been a major outreach effort by churches and such parachurch organizations as the Young Mens Christian Association since at least the turn of the century. It is commonly thought that by providing low-cost opportunities for youths to engage in vigorous physical exercise in a wholesome environment, such gymnasiums contribute to the moral health of the community. There is no more reason to label this sort of facility "non-religious" than many of the other community service and outreach ministries of American churches.

We believe, therefore, that under correct constitutional standards the district court should have concluded that the Deseret Gymnasium is understood, in good faith, by the LDS Church as part of its religious mission.[14] Accordingly, the Church has a First Amendment right to hire only members of its faith to carry on the activity. Under the facts of this case, therefore, there is no inconsistency whatsoever between constitutional requirements and the statutory exemption.

B. The Statutory Exemption Protects the Constitutional Rights of Churches and Eliminates the Need for Entangling Case-by-Case Inquiries Into the Scope of a Church's Religious Mission

The 702 exemption, as amended in 1972, carries out Congress' intention not to disturb the constitutional right of churches to hire only members of their own faith for all of their undertakings. Indeed, allowing space for churches to so decide, or not so decide, illustrates that there will be ecclesiastical diversity of polity and practice. We do not contend that the full sweep of this exemp-

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[14] We will not discuss the evidence bearing on Deseret Industries or Beehive Clothing Mills. The district court concluded that Deseret Industries was "religious" (J.S. App. 105a-116a) and ordered additional factfinding concerning Beehive Clothing Mills (J.S. App. 101a-105a).

tion is required in all circumstances by the First Amendment. There may be activities conducted by churches that, under their own self-definition, are so unrelated to their religious mission that religious antidiscrimination regulation would be constitutionally permissible. Nonetheless, we believe that the full 702 exemption is constitutionally justified because it eliminates the need for the government's enforcement bureaucracies and the courts to determine which of a church's activities are sincerely considered "religious." The exemption thus eliminates a source of entanglement and friction between church and state.

There can be no doubt that Congress has the authority to exempt religious organizations from regulation, even where not required to do so under the First Amendment. As this Court stated in *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." Accord, *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting). In *NLRB v. Catholic Bishop*, *supra*, the Court interpreted the NLRA as creating a specific exemption solely for religious organizations, in order to avoid the serious constitutional question that would have been raised if religious organizations were subjected to NLRB jurisdiction. And in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780-81 (1981), the Court interpreted the federal unemployment tax act as exempting church schools, partly to avoid doubts about the constitutionality of the contrary construction. It is evident that exempting religious organizations from government regulation is an accepted means for avoiding constitutional conflicts. In none of these cases has the Court suggested that such exemptions are likely to violate the Establishment Clause.

The district court held that exempting churches from the religious antidiscrimination regulations of Title VII

violates the Establishment Clause, insofar as the exemption goes beyond that required under the Free Exercise Clause. The court found the 702 exemption unconstitutional because it is not "facially neutral," but applies only to religious organizations (J.S. App. 66a), and because the exemption would allow religious organizations to "engage in conduct which can directly and immediately advance religious tenets and practices (J.S. App. 70a). This, according to the court (J.S. App. 69a), constitutes "the sponsorship of religion by government."

The district court has mistaken separation for sponsorship. The 702 exemption, like many other statutes and ordinances,[15] exempts religious organizations from a form of government regulation that, in the legislative view, is not sufficiently compelling to justify the intrusion into church autonomy. Churches are "singled out" for such exemptions, not for purposes of government "sponsorship," but because the tradition of separation of church and state teaches that the government and religious institutions should remain, insofar as possible, at arms length. For precisely the same reason that churches are made ineligible for government benefits that might entail excessive entanglement (*e.g., Lemon v. Kurtzman, supra*), churches are also exempted from many forms of government regulation. This is simply the consequence of institutional separation between government and religion. Sometimes separation helps churches; sometimes separation hurts churches; but in neither case can the

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[15] In addition to the exemptions at issue in *Catholic Bishop* and *St. Martin Evangelical Lutheran Church*, see 15 U.S.C. § 77c(a)(4) (churches exempt from disclosure and registration requirements of federal securities laws); 26 U.S.C. § 6033(a)(2)(A) (religious organizations exempted from filing of information returns); Opin. Letter of Employment Standards Administrators, No. 1240, Labor L. Rep. (CCH) paragraph 30,826 (Dec. 27, 1972) (certain religious employees exempted from federal minimum wage and maximum hour laws); Note, *Religion-Based Antitrust Exemptions: A Religious Motivation Test*, 57 Notre Dame Law, 828 (1982).

"special treatment" of religion be considered "sponsorship."

Nor is it plausible to view exemptions such as Section 702 as "advancing" religion. See J.S. App. 70a. When instituting a regulatory regime like Title VII, Congress must decide whether or not to apply it to religious organizations. In making the decision, Congress has some latitude. If Congress applies the new regulations to religious organizations, it may have the incidental effect of "inhibiting" religion. If it exempts religious organizations, this has the effect of leaving religion in the same position it was in before. While this might be considered "advancing" religion relative to regulated entities, it should more properly be viewed as leaving religion untouched. Whether religion is "advanced" by an exemption must be viewed against the baseline of government inaction, not on the assumption of government regulation.[16]

This Court has recognized that one permissible purpose for legislative judgments in this area is to eliminate the need for intrusive case-by-case inquiries into issues of religious sincerity. In *Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983), for example, the Court noted that "[t]he uniform application of the [prohibition on race discrimination] to all religiously operated [activities] *avoids* the necessity for a potentially entangling inquiry." In *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977), the Court stated that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will only happen once." In *NLRB v. Catholic Bishop*, 440

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[16] The district court analyzed the 702 exemption as if it augmented the powers of religious organizations. See J.S. App. 73a ("[u]nder section 702, the government has given religious organizations the authorization to exercise that type of coercive power"). In fact, under Section 702, the government leaves religious organizations in precisely the same position they had been for 200 years. To leave the church alone is not the same as giving it a benefit.

U.S. at 502, the Court sought to avoid the necessity of inquiries into "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission," The Court pointed out that "[i]t is not only the conclusion that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Ibid.* See also *Rusk v. Espinosa*, 456 U.S. 951 (1982), *aff'g* 634 F.2d 477 (10th Cir. 1980).

Avoiding such a "process of inquiry" is a constitutionally valid reason for extending a religious accommodation beyond the minimum necessary under the Free Exercise Clause. While such inquiries may be unavoidable in free exercise cases, when the legislature seeks to apply its regulations to the maximum extent permissible under the Constitution, they should be avoided whenever possible.

The congressional determination to exempt all activities of religious organizations from the religious antidiscrimination requirements of Title VII was a reasonable judgment to avoid potentially divisive entanglement. As the district court noted (J.S. App. 74a-75a) "this exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state."

As we read the language of Section 702, the exemption does not apply to all church-owned enterprises, but only to enterprises that are either themselves a religious institution or are operated directly by a religious institution. By its terms, the exemption applies only to a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1. A separately-incorporated business owned by a religious organization should

not be deemed a "religious corporation" for purposes of this statute. If a church purchased the stock of a chain of drugstores and operated the business as a separate corporation, the 702 exemption would not apply. The employer—the drugstore corporation—would be a commercial, and not a religious, corporation. The identity of the stockholder does not effect the character of the corporation. Only if the drugstores were operated directly by the church without a separate corporate identity would the 702 exemption apply.[17]

Accordingly, the issue in this case is the propriety of Congress's decision not to require an investigation into whether the activities *of the church itself* are "religious" or "secular." Because the only activities affected by the 702 exemption are those of the church itself, any such investigation would necessarily intrude into the ecclesiastical affairs of the employer. It could not be confined to the marginal, putatively "secular," aspects of church affairs.[18] Enforcement of Title VII, under the district court's ruling, would require churches to disgorge extensive information about their organizational structure, finances, and purposes. Cf. *Larson v. Valente*, 456 U.S. 228, 253 n.29 (1982) (the ordinance "calls for the provision of a substantial amount of information, much of which penetrate deeply into the internal affairs of the registering organization"); *Rusk v. Espinosa*, *supra* (same).

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[17] The LDS Church, for example, owns 100 per cent of the stock in a number of profit-making corporations. These business corporations are not subject to the 702 exemption. They do not discriminate with respect to religion in their employment decisions, and would not be permitted under the law to do so.

[18] See *Legislative History of the Equal Employment Opportunity Act of 1972* 1211-12 (statement of Sen. Ervin):

> As Supreme Court Justice Douglas so well declared in one of the school prayer cases, it is impossible to separate the religious and non-religious activities of a religious corporation. . . . This is so because the whole religious organization is one body and yet the bill would attempt to divorce the two kinds of activities each from the other.

The district court's approach depends on the proposition that it is a relatively simple matter to distinguish the "religious" from the "secular" activities of religious organizations. See also *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). Unfortunately, drawing such distinctions is far from simple, especially with regard to so sensitive an issue as religious criteria for hiring. At one end of the spectrum there are relatively straightforward cases: even the district court had no trouble in finding the ritual and doctrinal teaching functions of the church "religious". Slightly more ambiguous are the social and charitable activities of the church, which may resemble activities of secular organizations. Deseret Gymnasium is an example. Under proper constitutional principles, these activities should be deemed "religious" without need for extensive investigation. See *Tony & Susan Alamo Foundation v. Donovan*, 105 S. Ct. 1953, 1962 & n.25 (1985). To distinguish between the "religious" and the social or charitable activities of the church would intrude deeply into issues of theological self-understanding.

There is stronger basis for government regulation of profit-making activities of the church.[19] But even here, difficult religious issues often lurk beneath the surface, and Congress was justified in deciding that the entanglement is better avoided. Some "businesses" may be conducted by churches for specifically religious reasons. Examples include religious publishing,[20] religious broadcasting,[21] or the production of religious objects. Beehive

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[19] See *Tony & Susan Alamo Foundation v. Donovan, supra;* see also 26 U.S.C. §§ 511-513 (taxation of "unrelated business income" of religious organizations).

[20] *E.g., Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).

[21] *E.g., King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). *King's Garden* is an ironic example. The FCC's jurisdiction over King's Garden's hiring practices was based solely on the fact that "employment practices have an ob-

Clothing Mills is an instance of the latter.[22] Some businesses may be conducted by churches in order to provide employment for the needy or the handicapped, or for members of their own faith who may be out of work. Deseret Industries is an example of this. See J.S. App. 105a-116a. Some businesses may be conducted in an intensely religious atmosphere. Traditional monastic communities frequently engage in production of various items for sale to the public; yet it has never been suggested that the monks must open their ranks to outsiders. Some businesses may be conducted by religious communities in order to maintain their separation from the outside world. See *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer of Amish workers). Even among otherwise nonreligious church-owned businesses, the religious beliefs and moral standards of the church may cause the business to be conducted somewhat differently than a comparable secular business. As the district court noted (J.S. App. 73a), "religious authorities in charge of the activities of the religious organization would find it difficult to totally separate their religious beliefs from their ideas regarding valid business practices."

Essential to the religious element in any of these enterprises is the right to confine employment to members of the church's own faith. To deny the religious employer the right to hire only its members in such enterprises is tantamount to denying it the right to carry on such enterprises for religious ends. Thus, even among apparently commercial businesses, it would be necessary, in the absence of the 702 exemption, to inquire deeply into the relation between the activity and the religious mission of the church that owns that business. One need

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vious, if indirect, impact on programming." *Id.* at 53 n.4. But the court rejected the broadcaster's free exercise claim on the ground that the employment in question could have no effect on its "espousal" of religious views, *i.e.*, on its programming. *Id.* at 60-61.

[22] Beehive Clothing Mills does not, however, make a profit. Rather, it is subsidized by the Church. J. S. App. 98a-99a.

look no further than the record in this case to see how intrusive such an inquiry can be.[23]

Whether this form of investigation is necessary is a question of legislative judgment, in the first instance. At a certain point, the inquiry may become so intrusive that an exemption becomes constitutionally compelled on that basis alone. The district court's inquiry here approaches that point, if it has not exceeded it. But it is not necessary in this case to determine the constitutional limits on judicial investigation into the "religious" nature of church activities. Here, Congress had expressly determined that its policy of religious nondiscrimination is not sufficiently weighty to justify this degree of intrusion into the autonomy of religious organizations. That determination should be respected.

Congress has reached a different balance in other contexts, where its interest is more compelling, or where the investigation of church affairs is less sensitive than it is when religious hiring requirements are at issue. For example, Congress has created no exception on behalf of religious organizations from Title VII's prohibitions on race and sex discrimination in employment. It is therefore unavoidable in that context for courts to determine which activities of religious organizations are sufficiently "religious" that they are constitutionally exempt. See, *e.g.*, *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). This district court was wrong, however, to treat those cases as precedent supporting the legitimacy of such inquiries where Congress has deliberately chosen not to push its regulatory jurisdiction to the constitutional limit. See J.S. App. 45a-

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[23] The interrogatories in this case should be compared to the inquiries made concerning the religious content of the activity in *Catholic Bishop*, 440 U.S. at 507-08 (appendix to the Opinion of the Court), which this court cited as an example of the "sensitivity" of "[t]his kind of inquiry." *Id.* at 502 n.10.

48A. Obviously, Congress has judged that its interest in preventing religious discrimination by religious organizations is less compelling than its interest in preventing race and sex discrimination.

Where Congress has deliberately avoided the need for potentially entanging investigations into the internal religious affairs of religious organizations, the Establishment Clause is not thereby offended. On the contrary, the effect is to allow religious organizations to conduct their affairs without governmental intrusion, and to allow courts and government officials to abstain from sensitive judgments of a religious nature. The congressional judgment to exempt religious organizations from the religious antidiscrimination regulations of Title VII is fully harmonious with the religious freedom provisions of the First Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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January 5, 1987